STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARTY O. RICHARDSON,

Defendant-Appellant.

UNPUBLISHED
December 21, 2004

No. 244120
Wayne Circuit Court
LC No. 01-013717-02

Before: Cavanagh, P.J., and Jansen and Fort Hood, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions of armed robbery, MCL 750.529, and assault with intent to do great bodily harm less than murder, MCL 750.84. We affirm.

At trial, the victim testified that he was assaulted and robbed by defendant and codefendant Robert Earing. The victim testified that he was in the front passenger side of a van when Earing, who was in the back, reached around and slit his throat with a knife. Defendant, who was driving, then stopped the van and began hitting the victim while Earing continued to stab the victim. The victim stated that both men asked him for his money, and that Earing became upset when he discovered just a few dollars in the victim's wallet. The victim recalled both men going through his pants pockets, where he had approximately $85. After the assault, that money was missing. Defendant denied involvement in either assaulting or robbing the victim.

Defendant first argues that the trial court erred in permitting Earing's family and friends to testify about incriminating statements Earing made about his and defendant's role in the offense. The court admitted the statements pursuant to MRE 804(b)(3), as statements against Earing's penal interest. This Court reviews a trial court's decision to admit evidence for an abuse of discretion. Preliminary questions of law are reviewed de novo. *People v Washington*, 468 Mich 667, 670-671; 664 NW2d 203 (2003).

Defendant does not dispute that Earing's statements meet the requirements of MRE 804(b)(3). Nonetheless, he contends they were inadmissible under *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004), because Earing did not testify at trial and was not subject to cross-examination concerning the statements. "*Crawford* bars the admission of testimonial, out-of-court statements where the witness is unavailable and the defendant did not

have 'a prior opportunity for cross-examination' of the declarant." *People v McPherson*, 263 Mich App 124, 132; 687 NW2d 370 (2004), quoting *Crawford, supra*, 124 S Ct at 1374.

In *People v Shepherd*, 263 Mich App 665; ___ NW2d ___ (2004), this Court addressed the meaning of "testimonial" for purposes of *Crawford*. The codefendant in that case had made spontaneous, unprompted statements to his relatives about his role in an offense. The statements were made in a custodial setting and were overheard by jail guards. *Id*. After analyzing *Crawford* and other recent decisions, this Court concluded that the statements were not testimonial in nature. This Court stated that the declarant could not have reasonably believed that the statements would later be used at a trial. *Id*.

In this case, the circumstances surrounding Earing's statements present a more compelling case for concluding that the statements were not testimonial in nature. Earing made the statements to his mother, brother, brother's fiancée, and a friend shortly after the crime was committed. Unlike in *Shepherd*, there were no guards around when Earing made the statements. The circumstances surrounding the statements indicate that they were unprompted and spontaneous. Under these circumstances, the statements cannot be considered testimonial in nature and, therefore, are not prohibited by *Crawford*. *Shepherd, supra*. Accordingly, the trial court did not abuse its discretion in allowing the statements.

Next, defendant argues that he was deprived of his right to present a defense because he was not able to offer evidence of an exculpatory statement made by Earing. At trial, defense counsel conceded that he was not able to establish a basis for admitting Earing's allegedly exculpatory statement under the rules of evidence.

A defendant in a criminal case has the constitutional right to present a defense, which may, if necessary in order to receive a fair trial, include hearsay evidence if critical to the defense. *People v Herndon*, 246 Mich App 371, 411; 633 NW2d 376 (2001). However, a trial court's ruling excluding hearsay evidence generally does not deprive a defendant of the right to present a defense if the defendant is otherwise able to present his theory to the jury with other evidence or the proffered evidence is not trustworthy. *Id*.

In this case, the substance of Earing's statement is not apparent from the record. But even if we accept defendant's assertions concerning the nature of Earing's statement, defendant has not shown that he was deprived of his right to present a defense. Defendant was otherwise able to present, through his own testimony and the testimony of Nathan Hesselrode, his theory that the offense was committed by Earing alone. Therefore, the exclusion of Earing's hearsay statement did not deprive defendant of his right to present a defense.

Defendant next argues that the trial court erred when it refused to allow his mother to testify that telephone calls she received shortly before trial were made by the victim. The caller suggested that the case could be resolved out of court and that defendant could avoid prison if the caller was financially compensated. The trial court determined that there was an insufficient foundation for determining that the calls were made by the victim.

Defendant had the burden of establishing a proper foundation for the admission of this evidence. *People v Burton*, 433 Mich 268, 304 n 16; 445 NW2d 133 (1989). MRE 901 provides the requirements for establishing a foundation for voice identification testimony:

> (a) *General provision.* The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.
>
> (b) *Illustrations.* By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:
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> * * *
>
> (5) *Voice identification.* Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker. . . .

On a separate record, defendant's mother testified that she did not know the victim. She heard him testify at the preliminary examination, but that was held approximately five months before the calls were made to her home. She had no other contact with the victim and had never previously heard the victim's voice over the telephone. The trial court did not abuse its discretion in concluding that the evidence failed to show that defendant's mother was sufficiently familiar with the victim's voice to enable her to identify it over the telephone. Accordingly, because a proper foundation was not established under MRE 901, the trial court properly excluded the testimony.

Next, defendant argues that there was insufficient evidence to convict him of armed robbery. We disagree.

Armed robbery involves (1) an assault, (2) a felonious taking of property from the victim's person or presence, (3) while the defendant is armed with a dangerous weapon or "any article used or fashioned in a manner to lead the person so assaulted to reasonably believe it to be a dangerous weapon." MCL 750.529; *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). It was the prosecution's theory that defendant aided and abetted Robert Earing. To convict defendant as an aider and abettor, it was necessary to show that (1) the crime charged was committed by defendant or another person, (2) defendant performed acts or gave encouragement that assisted in the commission of the crime, and (3) defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time he gave aid and encouragement. *Id*. at 768. "Mere presence, even with knowledge that an offense is about to be committed or is being committed, is insufficient to show that a person is an aider and abettor." *People v Wilson*, 196 Mich App 604, 614; 493 NW2d 471 (1992).

Defendant argues that there was insufficient evidence to prove that he was involved in the felonious taking of the victim's property. We disagree.

The victim testified that both defendant and Earing asked him where he kept his money. He gave Earing his wallet, but Earing became upset because there were only a few dollars in it. Both men then asked him again where he kept his money. The victim claimed that both men went through his front pockets where he kept his money. Before the assault, the victim had $85 in his left front pocket, but that money was missing afterward.

Viewed in a light most favorable to the prosecution, the victim's testimony was sufficient to enable the jury to find beyond a reasonable doubt that defendant participated in a felonious taking of money from the victim's pocket. *People v Wolfe*, 440 Mich 508, 513; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). Although defendant points to inconsistencies in the victim's testimony, the credibility of the victim's testimony was for the jury to resolve. *Id*.

Next, defendant argues that statements by the trial court during jury voir dire amounted to plain error. Because defendant did not object to the statements at trial, he must demonstrate a plain error that affected his substantial rights. *Carines*, *supra* at 761-767.

During voir dire, the trial court told the jury that it must find defendant guilty if it believed that the prosecutor had proven all elements of the crime beyond a reasonable doubt. Defendant argues that it was improper for the court to instruct the jury that it was required to convict him if all elements of the offenses were proven beyond a reasonable doubt, because this prevented the jury from exercising its power of leniency.

Considered in context, we do view the trial court's statement as the equivalent of a jury instruction. Rather, the court was attempting to determine if the jurors would be willing to convict if the evidence established defendant's guilt beyond a reasonable doubt. Even if the court's comments can be construed as an instruction, however, they did not constitute plain error.

Juries possess the power of leniency. "However, this is a de facto power with regard to which the jury is not instructed." *People v Torres (On Remand)*, 222 Mich App 411, 420; 564 NW2d 149 (1997). "Jury nullification is the power to dispense mercy by nullifying the law and returning a verdict less than that required by the evidence." *People v Demers*, 195 Mich App 205, 206; 489 NW2d 173 (1992). A jury has the power to disregard a trial court's instructions, but it does not have the right to do so. *Id*. at 207.

Here, the court's comments did not prevent the jury from exercising its power of leniency. By nature, the *power* of leniency permits a jury to ignore the court's instructions. That is what the jury could have done in this case, i.e., ignore the court's statement that it must convict if the prosecutor proved all elements of the crime beyond a reasonable doubt. But defendant did not have a *right* to have the jury instructed in a manner that respected the *power* of jury nullification. *Torres (On Remand)*, *supra*. For this reason, a plain error has not been shown.

Defendant lastly argues that he is entitled to a new trial due to the cumulative effect of multiple errors. For the reasons stated, however, this is not a case where multiple errors occurred. Therefore, reversal is not required. *People v LeBlanc*, 465 Mich 575, 591; 640 NW2d 246 (2002).

Affirmed.

/s/ Mark J. Cavanagh
/s/ Kathleen Jansen
/s/ Karen M. Fort Hood